EMPLOYMENT TRIBUNALS

Claimants: **Mr. L Henderson**
Mr. M Swain
Mr. A Westran
Mr. D Bell
Mr. G Doherty
Mr. T Worrall
Mr. A Barnes
Mr. K Richardson

Respondents: **Kaefer Limited (First Respondent)**
European Asbestos Services Limited (Second Respondent)
Nottingham City Homes Limited (Third Respondent)
SGS United Kingdom Limited (Fourth Respondent)
Ductclean (UK) Limited (Fifth Respondent)
Axiom Building Solutions Limited (Sixth Respondent)

Heard at: **Nottingham**

On: **19th September 2023 (attended)**
20th September 2023 (Hybrid)

Before: **Employment Judge Heap (sitting alone)**

Representation

Claimants:	**Mr. P Harthan - Counsel**
First Respondent:	**Mr. P Johnstone – Solicitor**
Second Respondent:	**Mr. I Wheaton – Counsel**
Third Respondent:	**Mr. P Starcevic – Counsel**
Fourth Respondent:	**Ms. L Amartey – Counsel**
Fifth Respondent:	**Mr. M Upton – Director**
Sixth Respondent:	**Ms. A Beech - Counsel**

JUDGMENT

1. The claims against the Second, Third and Fourth Respondents have no reasonable prospect of succeeding and are struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

2. The Second, Third and Fourth Respondents are removed as Respondents to the proceedings.

3. Separate case management Orders are made in respect of the Claimants and remaining Respondents.

REASONS

BACKGROUND AND THE ISSUES

1. This Preliminary hearing was listed following earlier hearings before Employment Judges Adkinson and Smith. It is necessary to set out a little of the background of what happened at those earlier hearings before coming to the applications that are now before me.

2. The Claimants issued proceedings against three Respondents who are referred to as the First, Second and Third Respondents. Initially the claim was only permitted to proceed against the First Respondent because it had been rejected against the others as a result of what was erroneously thought to be a failure to comply with early conciliation requirements. That error was remedied by Employment Judge Adkinson at the first Preliminary hearing and a further Preliminary hearing listed after the Claim Form had been served on the Second and Third Respondents.

3. Both the Second and Third Respondents entered ET3 Responses with the Third Respondent providing some reference in their Response to some additional companies who were not at that time named as Respondents. Those three entities were subsequently joined as Respondents by Employment Judge Smith at the next Preliminary hearing and the Claim Form served on them. All have since entered ET3 Responses resisting the claims in their entirety.

4. The Second, Third and Fourth Respondents have all made applications that the claim against them be struck out and that they be dismissed as Respondents to the proceedings. That is strongly opposed by the First Respondent and also by the Claimants, albeit in much lesser terms.

5. In the alternative, the Third and Fourth Respondent's seek Deposit Orders in respect of the Claimants and the First Respondent to continue with an allegation that there was a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations of the Claimants' employment to them. This two day Preliminary hearing was listed in order to deal with the applications made by the Second and Third Respondents and the later application of the Fourth Respondent was added for consideration by Employment Judge McTigue.

6. The Fifth Respondent made representations on the first day of the Preliminary hearing that they also sought a strike out of the claim against them. I have explained that I cannot deal with that because it is outside the scope of this Preliminary hearing and there has been no preparation for dealing with the point. The instructions of Ms. Beech who appeared on behalf of the Sixth Respondent were that she would also be seeking to pursue such an application at a later stage and would seek Orders to deal with that. She accepts, however, that I cannot deal with the substance of

any such application at this hearing for the same reasons as in respect of the Fifth Respondent.

7. At the outset of the Preliminary hearing Mr. Johnstone, who appears on behalf of the First Respondent, made representations that the hearing should be converted to deal with case management because, in brief terms, some of the Respondents had provided witness statements and he submitted that that evidence needed to be tested or otherwise not considered and there was also an outstanding application for specific disclosure that had not been dealt with by the Tribunal. That application was opposed by the Second, Third and Fourth Respondents who had provided the statements and who all contended that the hearing should proceed. There was also a statement from the First Respondent in the event that such evidence was permitted.

8. I determined to proceed with the hearing as there had been no material change in circumstances with oral reasons given at the time and to consider the statements (including the one from the First Respondent) as background without hearing live evidence and for submissions to be given as to the weight. I did not consider the disclosure necessary at this stage to de-rail this hearing, which would have been the inevitable result, and that there could be submissions on any lack of documentation when considering the applications and the position of the parties at their highest.

9. Whilst I have not made any findings of fact, the facts are largely undisputed – by the Claimants at least – and are supported in some cases by documents to which I have been taken. Whilst dealing with the issue of documents I should remark that I was presented with a bundle of over well over 1000 pages. I was taken, after asking for a key document list, to what was probably less than 10% of that bundle. It is hoped that for future hearings the bundle can only comprise that which the Judge legitimately needs to see.

10. The hearing was listed for two day of hearing time and the first day was conducted in person. The second day proceeded at the sensible suggestion of Ms. Amartey as a hybrid hearing using via Cloud Video Platform with those who wished to attend remotely doing so. That was largely because of the number of participants and the set up of the hearing room made it difficult to comfortably accommodate everyone. There was some minor technical issues and also background noise which made it a little difficult for a full note of the Judgment to be taken. I an satisfied it was nevertheless a fair hearing and that that difficulty could be remedied at the sensible suggestion of Mr. Wheaton that these written reasons be produced for the parties.

11. I have not rehearsed in detail the submissions of the parties with regard to the strike out and deposit Order applications but all of the parties should be assured that I have considered carefully each of the arguments advanced on each side both orally and in the case of the First and Third Respondents also in writing. As a result of the decision that I made on the first part of the application it has not been necessary for me to consider either the law or any conclusions in relation to making deposit Orders.

THE LAW

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

12. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

13. Rule 37 provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

(a) That it is scandalous or vexatious or has no reasonable prospect of success.
(b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(b) For non-compliance with any of these Rules or with an order of the Tribunal;
(c) That it has not been actively pursued;
(d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"

14. The only consideration for the purposes of this Preliminary hearing is whether the claims, or any part of them, can be said to have no reasonable prospect of success.

15. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (see paragraph 6):

> *"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"*

16. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**.

CONCLUSIONS

17. I start with some background which appears uncontroversial. The Claimants were all employed at various times by the First Respondent who provided services relating to asbestos removal at properties managed by the Third Respondent on behalf of Nottingham City Council. It is the Claimant's case that their employment came to an end and they were treated as dismissed on 8th November 2021.

18. It also appears uncontroversial that the First Respondent intended to cease carrying out those activities for the Third Respondent and gave notice of the termination of those arrangements. The Third Respondent intended to appoint a new contractor to undertake those activities in place of the First Respondent.

19. That brings me to the involvement of the other Respondents and my conclusions in respect of the applications of the Second, Third and Fourth of them.

The Second Respondent

20. The Third Respondent initially approached the Second Respondent to see if they were interested in taking over the contract previously held with the First Respondent for asbestos removal. Discussions took place in November and early December 2021 and in the early stages it is not in dispute that the anticipation was that the Second Respondent would be appointed, enter into contractual arrangements with the Third Respondent and take over the activities previously performed by the First Respondent. That would involve the 8 Claimants in this case transferring over to the Second Respondent pursuant to TUPE.

21. However, the position of the Second Respondent is that whilst it is accepted that they were approached and it was anticipated that they would take over, that never in fact happened because they realised that the proposed contract was not economically viable and attempts to deal with that by way of indemnities stalled. That is not disputed by any of the other Respondents save as for the First Respondent. No positive case is advanced by Mr. Harthan on behalf of the Claimants that this is not what happened. That is the evidence that would be given at a full hearing and I have seen the witness statement of Gary Spillane on that issue. Whilst I am mindful that there has been no cross examination on that statement it is difficult to see what that might yield.

22. There is support for what is said in that statement in the email at page 225 of the hearing bundle which effectively brought negotiations between the Second and Third Respondents to an end. There is no evidence

whatsoever of any further discussions less still of the Second Respondent having undertaken any of the previous activities performed by the First Respondent.

23. Whilst Mr. Johnstone submits that it remains a triable issue and that full disclosure has not yet taken place, there is absolutely nothing that can be pointed to in order to suggest that the position explained by the Second Respondent is not accurate and that they never undertook any of the activities in question. Page 225 points to that being the reality and disclosure for this hearing has taken place when the Second Respondent has been legally represented and aware of its disclosure obligations. If there is nothing to gainsay now what the Second Respondent's evidence would be at the full hearing, then there is no realistic prospect of that changing.

24. Whilst I accept given what the anticipated position was going to be and what the Claimants were told about that in the early stages the First Respondent might well have been sceptical about what later transpired, but it is plain to see at this point what had occurred. This is not a case where there can now be reasonably said to be plain evidential disputes which need to be ventilated in evidence.

25. Given that the Second Respondent never contracted with the Third Respondent and never undertook any activities for them they cannot fall within the provisions of Regulation 3(b)(ii) Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") as a "subsequent contractor". The claim against them therefore has no reasonable prospect of succeeding.

26. There is one other factor that Mr. Johnstone relies on as being such that a full hearing was necessary against this particular Respondent, which is that one of the Claimants, Mr. Swain, is now employed by the Second Respondent. However, that is not as a result of a transfer or working on a contract with the Third Respondent. It is clear that it is completely independent employment and simply because it is in the asbestos removal field is not indicative of TUPE applying. It is no different to someone who used to work in Tesco applying for a new job at Asda and it is notable that this is not a point that is relied on by the Claimants.

27. Given my conclusion that the claims against the Second Respondent have no reasonable prospect of succeeding I then have to consider whether to strike them out. I can see no good reason not to do so nor have the Claimants made any particular representations on that point. Remaining in these proceedings will incur the Second Respondent significant additional time and costs for no purpose. It would not serve the Claimants or the First Respondent either because there may be costs applications made at the conclusion of the full hearing. I am therefore satisfied that the claims against the Second Respondent in respect of all Claimants should be struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) 2013.

28. I have carefully considered whether they should remain a party to the proceedings as Mr. Johnstone contends on the basis that that is required because of the issue of joint and several liability for the failure to inform

and consult claims. I have determined that they should not remain a party because I accept the submission of Mr. Wheaton that if they were not the transferee and never contracted with the Second Respondent the duty to inform and consult in relation to them did not arise.

29. I have also considered Mr. Johnstone's point that if a Tribunal later determined that there had in fact been a transfer then the Claimants would be left without remedy. That is really answered by the no reasonable prospects of success point. It is no different to the strike out of any other claim with no prospect of succeeding and would essentially bar to strike out where a positive case cannot be articulated but in the hope that something might possibly at some point in time come out in the wash and it is perhaps even further removed here when it is clear from the evidence that I do have what actually happened.

30. Moreover, the lack of remedy point is also one it seems to me that is for the Claimants and not the First Respondent and I have heard very little by way of submissions for their part.

The Third Respondent

31. The position of the Third Respondent is that it never undertook any of the activities previously performed by the First Respondent "in house" and it is plain that there was never any intention to do so.

32. Although Mr. Johnstone submits that the Claimants were all doing a goodly proportion of what has been referred to as "ancillary work" over and above asbestos removal, that was not the position taken by Mr. Harthan on behalf of the Claimants who made it plain that the pleaded case was that they were asbestos removers and he had no instructions to seek any amendment. That was also reflected in the contract between the First and Third Respondents which I have seen as part of this hearing. In all events, even had that not been the case the position of the Third Respondent – which Mr. Harthan did not refute on behalf of the Claimants – is that it never undertook any of the activities which comprised the work that the First Respondent had been doing. It may have done similar repair activities elsewhere, but not the work that the Claimants were undertaking.

33. That itself is plain from the evidence that Matthew Woods would give at a full hearing. Whilst I am again mindful of Mr. Johnstone's point that that has not been tested in cross examination, again I cannot see what point that would serve when, in a voluminous bundle, there is not one piece of evidence to suggest that Mr. Woods is wrong and nor are any of the other Respondents – nor importantly the Claimants - positively asserting that he is.

34. If the Third Respondent never carried out any of the works that comprised the activities performed by the First Respondent then they cannot fall within Regulation 3(b)(iii) TUPE Regulations.

35. The claim against them therefore also has no reasonable prospect of succeeding. I then have to consider whether to strike out the claim against the Third Respondent. Again, I can see no good reason not to do

so nor have the Claimants made any particular representations on that point.

36. Remaining in these proceedings will incur the Third Respondent significant additional time and costs, again for no purpose. It would again not serve the Claimants or the First Respondent either because there has already been reference made in this hearing about costs applications being made at the conclusion of the full hearing. I am therefore satisfied that the claims against the Third Respondent in respect of all Claimants should be struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) 2013.

37. I have again considered whether they should remain a party to the proceedings as Mr. Johnstone contends. Again, that was firstly on the basis that if a Tribunal later found that there had been a transfer then the Claimants would be left without remedy. That really falls with the point that the transfer argument has no reasonable prospects of success and it is also in reality a matter for the Claimants and not the First Respondent.

38. The second part of the First Respondent's argument is on the basis that that is required because of the issue of joint and several liability for the failure to inform and consult claims. However, for the same reasons as I dismissed the claims against the Second Respondent I have determined that they should not remain a party because they too were not the transferee.

<u>The Fourth Respondent</u>

39. The position of the Fourth Respondent is that they were approached by the Third Respondent who was, after the end of the contract with the First Respondent, still looking for another contractor to provide asbestos removal services. That is supportive of the fact that the Third Respondent was not carrying out those works itself, even on an interim basis. It does not appear to be disputed that the asbestos removal work involved work that required a special licence to undertake it and also unlicensed work which did not. Neither the Third or Fourth Respondents held a licence and as such could not carry out any of the licenced work.

40. The Fourth Respondent's position is that they carried out different work with the Third Respondent which was quite distinct from the activities performed by the First Respondent because it involved asbestos surveys. That was not work done by the First Respondent and as I have already observed it was entirely separate. It is only the relationship it seems that led them to be approached to see if they could assist with the actual asbestos removal work in addition.

41. The Fourth Respondent could not carry out the activities required in respect of asbestos removal. Their position is that they contacted another company to undertake what are referred to as "emergency asbestos removal" pending the appointment of a contractor to do the full range of works of the regular asbestos removal that had previously been done by the First Respondent. That position is agreed by the Third Respondent. It is not disputed by the Claimants.

42. The evidence that the Fourth Respondent would give at a full hearing would be consistent with that. Whilst again I am mindful that that evidence within the witness statement of Mr. Hughes has not been tested under cross examination as Mr. Johnstone submits that it should be, there is nothing at all to suggest that that would make any difference at all as to how matters are understood at this juncture. There has been disclosure from the Respondents for the purposes of this application and the relevant parties are legally represented and aware of their disclosure obligations.

43. The thrust of what the Fourth Respondent was doing was facilitating another contractor to undertake emergency asbestos removal only pending the appointment of a new contractor to do what the First Respondent had previously been doing. Emergency asbestos removal was not the same as the activities that the First Respondent was performing under the relevant contract nor was the Fourth Respondent actually carrying them out in all events. Again, they cannot therefore fall under the provisions of Regulation 3(b)(ii) TUPE as a "subsequent contractor". The claim against them therefore has no reasonable prospect of succeeding. I then have to consider whether to strike out the claim and the same considerations apply which I have already dealt with in respect of the Second and Third Respondents. The position is no different here and there is no good reason that the claims against them should not be struck out.

44. I have also reached the same conclusions in respect of whether the Fourth Respondent should be dismissed as a party to the proceedings as in respect of the Second and Third Respondents. They are therefore also removed as a Respondent.

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Employment Judge Heap

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Date: 20th September 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
14th November 2023

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FOR THE TRIBUNAL OFFICE

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